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No. 00-1519

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

*v.*

RALPH ARVIZU

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## QUESTIONS PRESENTED

1. Whether the court of appeals erroneously departed from the totality-of-the-circumstances test that governs reasonable-suspicion determinations under the Fourth Amendment by holding that seven facts observed by a law enforcement officer were entitled to no weight and could not be considered as a matter of law.

2. Whether, under the totality-of-the-circumstances test, the Border Patrol agent in this case had reasonable suspicion that justified a stop of a vehicle near the Mexican border.

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 1a-20a) is reported at 232 F.3d 1241. The oral decision of the district court (Pet. App. 21a-27a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 7, 2000. A petition for rehearing was denied on December 1, 2000 (Pet. App. 3a). On February 16, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 31, 2001 (a Saturday). The petition was filed on April 2, 2001, and was granted on June 4, 2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

## STATEMENT

Following the denial of his motion to suppress evidence in the district court, respondent entered a conditional plea of guilty to the charge of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C). Pet. App. 8a; J.A. 11. Respondent was sentenced to ten months' imprisonment, to be followed by 36 months' supervised release. J.A. 12. The court of appeals reversed. Pet. App. 1a-20a.

1. In January 1998, Border Patrol Agent Clinton Stoddard was assigned to the permanent Border Patrol checkpoint at the intersection of Highway I-191 and Rucker Canyon Road, north of the border town of Douglas, Arizona. Pet. App. 4a-5a.[1] The I-191 checkpoint is approximately 30 miles from the Mexican border. *Id.* at 4a; J.A. 24; see also J.A. 155, 157 (maps). The Border Patrol opens and closes the checkpoint without notice, but when opened, the checkpoint remains open for weeks or months at a time. J.A. 50. As part of its effort to prevent illegal aliens who have crossed the international border in Arizona from

[1] The facts were adduced at a hearing on respondent's motion to suppress evidence, at which the district court took testimony from the arresting officer, a defense investigator, respondent, and respondent's sister, and heard oral argument. See J.A. 15-154.



passing further into the United States, the Border Patrol stops all traffic that passes through the checkpoint when it is open. J.A. 20.[2]

Agent Stoddard had been assigned to the Border Patrol's Douglas station for more than two years. J.A. 18. He had received training on detecting illegal-alien and narcotics smuggling, and on smuggling activity in the Douglas area. J.A. 19-20. Agent Stoddard also had trained other agents on smuggling detection techniques. J.A. 20. Agent Stoddard estimated that while working on "roving patrols," he had stopped more than 50 vehicles carrying illegal aliens or drugs. J.A. 22.

On January 19, 1998, the I-191 checkpoint was open and conducting vehicle inspections. At approximately 2:15 p.m., a sensor monitored by the Border Patrol detected a vehicle traveling north on Leslie Canyon Road. Pet. App. 4a-5a; J.A. 24-25, 28. Leslie Canyon Road begins near the border in Douglas and parallels both I-191, which is to the west, and the boundary of the Coronado National Forest, which is to the east.

[2] This Court has recognized the "formidable law-enforcement problems" associated with illegal immigration from Mexico, *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 553 (1976), as well as "the enormous difficulties of patrolling a 2,000-mile open border and the patient skills needed by those charged with halting illegal entry into this country," *United States* v. *Cortez*, 449 U.S. 411, 418-419 (1981). To carry out its mission of enforcing the immigration and narcotics laws, the Border Patrol relies heavily on its power to inspect vehicles at fixed checkpoints in the vicinity of the border, and to make those checkpoints effective by stopping suspicious vehicles that circumvent them. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 879 (1975); *Martinez-Fuerte*, *supra* (upholding against Fourth Amendment challenge the use of fixed immigration checkpoints removed from the border).

Pet. App. 4a; see J.A. 25-26, 155, 157.[3] A vehicle traveling north from Douglas can use Leslie Canyon Road to bypass the Border Patrol checkpoint on I-191. Pet. App. 5a; J.A. 26-27. Like most of Leslie Canyon Road, the portion of road where the sensor is located is unpaved dirt. Pet. App. 4a; J.A. 27-28, 98-99; see also J.A. 161, 165-171 (respondent's photographs of Leslie Canyon Road). That portion of Leslie Canyon Road is used mostly by ranchers, Forest Service personnel, and the Border Patrol. Pet. App. 4a; J.A. 26. On a typical day, vehicles trigger the sensor only once every two hours or so. J.A. 57. As Agent Stoddard testified, "[y]ou can sit on that road for hours and not see a vehicle go by." J .A. 28.

The fact that the sensor gave an alert at about 2:15 p.m. was significant because that was approximately the time when the agents who patrolled the area around the I-191 checkpoint suspended their surveillance and began returning to the checkpoint for a 3 p.m. shift change. Pet. App. 5a; J.A. 26, 47-48. As Agent Stoddard testified, smugglers are aware of the Border Patrol's shift changes and they "seem to do the most smuggling * * * when the agents are en route back to the checkpoint." J.A. 26.

Agent Stoddard left the I-191 checkpoint and drove east on Rucker Canyon Road, toward Leslie Canyon Road, to investigate the sensor report. As he drove, a second sensor located north of the first sensor reported traffic, indicating that the vehicle had turned west on Rucker Canyon Road and was coming toward Stoddard and I-191. Pet. App. 5a; J.A. 29. The vehicle was now

[3] The court of appeals incorrectly stated (Pet. App. 4a) that Leslie Canyon Road is in the Coronado National Forest. In fact, the road is entirely outside the national forest. See J.A. 155, 157.



headed away from recreation areas in the national forest, which can be reached by driving east on Rucker Canyon Road. J.A. 29, 31, 52-54; see J.A. 155. If the vehicle next turned right (north) onto Kuykendall Cutoff Road, it would circumvent the I-191 checkpoint and could proceed to cities such as Tucson and Phoenix with very little chance of being stopped by the Border Patrol. That route along dirt roads (north on Leslie Canyon Road paralleling I-191, west on Rucker Canyon Road away from the national forest, and then north on Kuykendall Cutoff Road before reaching the I-191 checkpoint) "is a notorious route of travel" that illegal aliens and drug traffickers use to avoid the checkpoint. J.A. 30.

As Agent Stoddard drove east on Rucker Canyon Road to intercept the vehicle coming west, he spotted a minivan. Based on the minivan's westbound direction, the timing of the sensor alarms, and the absence of any other traffic, Stoddard believed that the minivan was the vehicle that had tripped the sensors. J.A. 31-32. Stoddard pulled his truck to the side of the road so that he could get a good look at the minivan when it passed. Pet. App. 5a; J.A. 32. Agent Stoddard testified that, when the minivan approached the parked Border Patrol vehicle (which was equipped with official lights, see J.A. 107), it slowed dramatically, cutting its speed from approximately 50 to 55 miles per hour to approximately 25 to 30 miles per hour. Pet. App. 6a; J.A. 32, 57.[4]

Agent Stoddard saw five people in the minivan. Respondent was driving, an adult woman was in the front seat, and three children were in the back seats. Agent Stoddard observed that respondent appeared

[4] Respondent testified that he was traveling at "[a]bout 20 to 30 miles an hour" and did not slow down abruptly. J.A. 105.

rigid and nervous. He gripped the steering wheel tightly and avoided eye contact with Stoddard. Pet. App. 6a; J.A. 33.[5] The adult passenger also appeared to Stoddard to be "uptight." J.A. 33-34. The two children in the rear seat sat with their knees unusually high, as if their feet were resting on top of an object on the floor of the vehicle. Pet. App. 6a; J.A. 34.

Agent Stoddard was familiar with the local vehicles in the area, but he did not recognize the minivan. Pet. App. 7a; J.A. 37. The minivan also was noteworthy because most drivers on the dirt roads that respondent traveled use four-wheel drive vehicles. J.A. 36, 63-64. Indeed, at the intersection of Leslie Canyon Road and Rucker Canyon Road, Rucker Canyon Road is signed: "PRIMITIVE ROAD DRIVE WITH CARE." J.A. 83, 171. The Border Patrol had discovered a minivan smuggling marijuana in the same area a few weeks earlier, and Stoddard knew from personal experience and the experience of other agents that smugglers commonly use minivans to carry illegal aliens and drugs. J.A. 27, 33, 74.

Agent Stoddard followed the minivan. All three children in the van then began waving simultaneously, on and off, for about five minutes while facing forward, without ever turning around to look at Stoddard. Pet. App. 6a; J.A. 35-36, 61, 73. Agent Stoddard testified that the waving—which he demonstrated to the district court—"wasn't in a normal pattern." J.A. 35. He

[5] The district court rejected as not credible respondent's assertion that he was relaxed when he saw the Border Patrol vehicle. "I find it very difficult to believe," the district court stated, "that somebody carrying 125 * * * pounds of marijuana in their vehicle is going to be relaxed when they see a law enforcement officer." Pet. App. 24a.



suspected that the waving was being choreographed by the adults. J.A. 35, 61.

After turning his blinker on, then off, then on again, respondent abruptly turned north onto Kuykendall Cutoff Road, the final turn on the route that would bypass the I-191 checkpoint. Pet. App. 6a; J.A. 36; see also J.A. 106. Around that time, Stoddard ran a license check and learned that the vehicle was registered to an address in Douglas. Stoddard recognized the address as being just four blocks north of the Mexican border, on a street that smugglers frequently used as a staging area for transporting illegal aliens and narcotics further into the United States. Pet. App. 7a; J.A. 37-38, 65-67.

Agent Stoddard stopped the minivan. Respondent leaned out of the driver's window and greeted Stoddard in an excited tone of voice. When Agent Stoddard asked where respondent was going, respondent said he was headed to a park, but he could not remember its name.[6] Stoddard observed that respondent's hands were shaking and his forehead was sweaty, even though it was a cool January day. Pet. App. 7a; J.A. 38-43. After asking respondent some questions about his immigration status and cargo, Stoddard asked for and received consent to search the vehicle. Pet. App. 7a-8a, 25a-26a; J.A. 43-44.[7] Agent Stoddard then opened the side door, smelled marijuana, and saw a black duffel bag

[6] Respondent testified at the suppression hearing that he was going to a location known as Turkey Creek "to meet up with a gentleman" whom he did not know, who would be driving a Ford pickup truck. J.A. 116-117.

[7] Although respondent testified that he understood Agent Stoddard only to be seeking permission "[t]o look in" the van, J.A. 112-113, the district court found that "[t]here is no lack of clarity or uncertainty that the agent was asking to search the vehicle if [respondent] consented to that." Pet. App. 26a; see also *id.* at 20a.

under the feet of the two children in the back seat of the vehicle. Pet. App. 8a; J.A. 44-45. Respondent consented to a search of the duffel bag, whereupon Stoddard discovered marijuana wrapped in cellophane. Border Patrol agents later found another bag of marijuana behind the rear seat. J.A. 45-46. The marijuana found in the minivan weighed 123.85 pounds and had an estimated value of $99,080. Crim. Compl.; 1/19/98 U.S. Border Patrol Report of Apprehension or Seizure.

2. Respondent moved to suppress the marijuana on the ground that Agent Stoddard lacked reasonable suspicion to stop the minivan and lacked authority to search it. After taking testimony and hearing argument on the motion, see J.A. 15-154, the district court ruled that Agent Stoddard had reasonable suspicion to stop the minivan, Pet. App. 21a-27a. Stating that the evidence had to be considered "in the context of what was going on out there and in the context of the information available to the officer making the stop," *id.* at 22a, the district court identified ten specific facts that supported Stoddard's suspicion of illegal activity:

(1) The minivan was on "poorly traveled" roads that parallel the interstate highway and are "used to circumvent the checkpoint" on I-191. Pet. App. 22a-23a; see also *id.* at 23a (Leslie Canyon Road "certainly isn't a heavily traveled road by any stretch of the imagination.").

(2) The minivan had passed the only recreation area in the vicinity (which was to the east, off Rucker Canyon Road), and the next recreation area was "quite a few miles to the north," at the Chiricahua National Monument. Pet. App. 22a. The distant recreation area was accessible by taking



I-191 to I-181, which would avoid having to make a "40-mile trip at least, through a dirt road." *Ibid.*

(3) The minivan appeared to "slow[] down appreciably" when respondent saw the parked Border Patrol vehicle. Pet. App. 23a.

(4) The minivan's trip coincided with the beginning of the Border Patrol's shift change, when agents return to the I-191 checkpoint and leave the area open to smugglers. Pet. App. 23a.

(5) In Agent Stoddard's experience, smugglers in the Douglas area use minivans; also, the Border Patrol had recently stopped a similar minivan carrying a load of marijuana in the same area. Pet. App. 23a-24a.

(6) Respondent appeared nervous when he drove past Agent Stoddard and respondent's demeanor was consistent with illegal activity. Pet. App. 24a.

(7) Stoddard, having worked in the area, did not recognize the minivan as being from one of the local ranches. Pet. App. 24a.

(8) The raised position of the children's legs suggested that there was cargo on the rear floor of the minivan. Pet. App. 24a-25a.

(9) The children waved in a "methodical," "mechanical way" for four or five minutes without looking at Agent Stoddard, which "was a fact that is odd and would certainly lead a reasonable officer to wonder why are they doing this." Pet. App. 25a.

(10) The minivan was registered to an area that Agent Stoddard "kn[e]w to be an often-used smuggling area." Pet. App. 25a.

On the basis of those ten factors, collectively, the district court found that Agent Stoddard had reasonable suspicion to stop the minivan. Pet. App. 25a. The district court further found that respondent consented to the search of his minivan and duffel bag without any coercion by Stoddard, and that, in any event, Stoddard had probable cause to search the bags after he smelled marijuana. *Id.* at 25a-26a.

3. The court of appeals reversed.[8] It recited established standards for determining whether reasonable suspicion exists, see Pet. App. 8a-11a, but indicated concern that the "fact-specific weighing of circumstances" required by these standards "introduces a troubling degree of uncertainty and unpredictability into the process" of determining whether reasonable suspicion exists. *Id.* at 12a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1142 (9th Cir.) (en banc) (Kozinski, J., concurring), cert. denied, 121 S. Ct. 211 (2000)). Accordingly, the court of appeals was of the view that "[w]hat factors law enforcement officers may consider in deciding to stop and question citizens minding their own business should, if possible, be carefully circumscribed and clearly articulated." *Id.* at 11a (quoting *Montero-Camargo*, 208 F.3d at 1142 (Kozinski, J., concurring)). To that end, the court stated that it intended to use this case "to describe and clearly

[8] The court of appeals issued its initial opinion on July 7, 2000. On December 1, 2000, the court revised its opinion and, based on the amended opinion, denied the government's petition for rehearing or rehearing en banc. See Pet. App. 1a-20a. The changes made to the initial opinion are identified at Pet. App. 2a-3a.



delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." *Id.* at 12a.

Specifically, the court of appeals held that the district court had improperly relied on seven factors that were "neither relevant nor appropriate to a reasonable suspicion analysis in this case," Pet. App. 12a, and "must be disregarded as a matter of law," *id.* at 14a (quoting *Montero-Camargo*, 208 F.3d at 1132). *First*, the court held, "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and cannot contribute to reasonable suspicion of unlawful activity. *Id.* at 12a. *Second*, respondent's failure to acknowledge Agent Stoddard as he drove by the officer "provides no support for Stoddard's reasonable suspicion determination." *Id.* at 13a. *Third*, the children's "odd act" of waving to Agent Stoddard without looking at him "carries no weight in the reasonable suspicion calculus." *Id.* at 13a-14a. *Fourth*, the court continued, "[t]he fact that one minivan stopped in the past month on the same road contained marijuana is insufficient to taint all minivans with suspicion." *Id.* at 14a. *Fifth*, Agent Stoddard's failure to recognize the minivan as a local vehicle "fails to contribute to the reasonable suspicion calculus" because "the area in question is one that is used for many purposes by different kinds of people." *Ibid.* *Sixth*, the fact that the minivan was "registered to an address in a block notorious for smuggling is also of no significance and may not be given any weight." *Id.* at 15a. *Seventh*, and finally, the court ruled that the appearance that there was cargo on the floor of the minivan, "while consistent with [carrying] illicit substances," was "all too common to be of any relevance." *Id.* at 16a-17a.

The court of appeals deemed only three factors relevant to reasonable suspicion analysis: the road used by the minivan was sometimes used by smugglers; the minivan was traveling around the time of the Border Patrol's shift change; and, as a general matter, smugglers sometimes use minivans. Pet. App. 17a. The court of appeals concluded that those three factors, considered in isolation from the other seven factors that it deemed irrelevant, did not "constitute reasonable suspicion either singly or collectively." *Ibid.* The route taken by respondent, in the view of the court, was "of only moderate significance" because "the road in question is used for a number of entirely innocuous purposes." *Id.* at 17a-18a. The shift change, the court concluded, "is of little probative value" because the minivan tripped the first sensor approximately 45 minutes before the shift change. *Id.* at 18a. And minivans, the court stated, "although sometimes used by smugglers, are among the best-selling family car models in the United States." *Ibid.*

Based on that analysis, the court of appeals held that Agent Stoddard's stop of respondent's minivan was unlawful and that the unlawful stop tainted respondent's consent to the search of his vehicle. Pet. App. 18a-19a. The court of appeals therefore reversed the district court's denial of respondent's motion to suppress evidence and remanded the case. *Id.* at 20a.

## SUMMARY OF ARGUMENT

1. This Court has held repeatedly and consistently, over the course of more than 30 years, that reasonable-suspicion analysis requires examination of all the facts known to the law-enforcement officer who makes an investigative stop. Because courts must consider "the whole picture" seen by the officer, *United States* v. *Cortez*, 449 U.S. 411, 417 (1981), conduct that is ambiguous and susceptible of an innocent explanation when viewed in isolation can nevertheless support reasonable suspicion.



The court of appeals suggested that contextual application of the Fourth Amendment's reasonableness standard, as required by this Court, makes it too uncertain whether particular conduct will or will not support an investigative stop. Reasonable suspicion, however, is a commonsense concept rather than a technical one, and it is not susceptible to expression in "a neat set of legal rules." *United States* v. *Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983)). Because reasonable suspicion is inherently contextual, rules of the sort adopted by the court of appeals—which broadly address particular facts without regard for context—create the potential for misapplication of the Fourth Amendment. If those rules were made more specific in an effort to minimize constitutional error, they would be too numerous and too complicated for officers to apply when they make the split-second decision whether to stop an individual for questioning. This Court's contextual approach therefore is more faithful to the text of the Fourth Amendment, as well as more responsive to the practical requirements of law enforcement, than the court of appeals' categorical rules.

The specific rules adopted by the court of appeals are plainly incorrect. The court of appeals held, for example, that some types of conduct, such as decelerating upon seeing a law-enforcement vehicle and carrying cargo on the floor of a family minivan, are nearly always innocent and cannot contribute to reasonable suspicion. Yet under any number of scenarios—including the facts of this case—those actions do raise objectively reason-

able questions about possible illegal conduct. An individual's reaction upon seeing a law enforcement officer, which the court of appeals also deemed irrelevant as a matter of law, likewise can suggest possible criminal activity under some circumstances. The same is true of the address to which an individual's vehicle is registered, which the court of appeals excluded from consideration as a matter of law. In each instance, the court of appeals' rule requiring exclusion of the factor sweeps far too broadly and contravenes the totality-of-the-circumstances approach.

2. When all of the facts are considered, reasonable suspicion supported Agent Stoddard's decision to stop respondent and question him. Respondent's route bypassed the fixed Border Patrol checkpoint on I-191, and none of the information available to Agent Stoddard provided an innocent explanation for respondent's choice of that route; it was a time of day when smugglers increase their activity because of the Border Patrol's shift change; respondent appeared to be carrying a large amount of hidden cargo; the minivan's registration suggested that respondent's northbound trip had begun on a street that was very close to the Mexican border and was known as a common starting point for smuggling runs; smugglers in the Douglas area had used minivans in the same area in the recent past; and respondent and his passengers appeared nervous and behaved oddly upon seeing Agent Stoddard's Border Patrol vehicle. Each of those facts reinforced the others, and together they made it objectively reasonable for Agent Stoddard to suspect that respondent was carrying illegal cargo.



## ARGUMENT

### I. THE COURT OF APPEALS ERRED BY CATEGORICALLY EXCLUDING FACTS FROM CONSIDERATION IN THE TOTALITY-OF-THE-CIRCUMSTANCES INQUIRY

This Court has held repeatedly that the Fourth Amendment requires courts to consider the totality of the circumstances surrounding a law-enforcement officer's decision to make an investigative stop. The significance of a particular fact must be determined in the context of the other facts known to the officer, and cannot be established for all cases on a categorical basis. That rule is consistent not only with the reasonableness standard of the Fourth Amendment, but also with the practical realities of law enforcement.

#### A. Reasonable-Suspicion Analysis Requires Consideration Of "The Whole Picture" Seen By The Officer

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court made clear that the reasonableness of a law-enforcement officer's suspicion must be judged by considering the totality of the circumstances known to the officer, and facts that do not inherently suggest criminal activity may, in context, support such an inference by the officer. In *Terry*, a police officer on his beat observed two men taking turns walking past a store window and repeatedly conferring with each other and with a third man. Suspecting that the men were "casing" the store for "a stick-up," the officer approached the three men, identified himself as a police officer, and asked for their names. *Id.* at 6-7. After getting no clear response, the officer grabbed and patted down one of the men (Terry), and felt a pistol. The officer then ordered all

three men into a store, patted down Terry's companions, found another gun, and took all three men into custody. *Id.* at 7. Terry was charged with carrying a concealed weapon, and the state courts denied his ensuing motion to suppress the evidence. *Id.* at 7-8.

This Court held that the officer "seized" Terry for Fourth Amendment purposes when he took hold of him, 392 U.S. at 16-19, but that the stop to investigate possibly criminal activity was not as intrusive as an arrest and did not have to be justified by probable cause, *id.* at 20-23. The governing constitutional principle was that the seizure (and the ensuing search for weapons) may not be "unreasonable," *id.* at 9, 20; see U.S. Const. Amend. IV, which turns on "the facts of the case," 392 U.S. at 15; see *id.* at 21 ("a judge * * * must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances"). Specifically, "the police officer must be able to point to specific and articulable facts" available to the officer at the moment of the seizure "which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Id.* at 21. Applying that standard, the Court found it immaterial that the visible acts of Terry and his companions—standing on a street corner, walking up and down a street, looking in a store window, and conversing—might "each [be] perhaps innocent in itself." *Id.* at 22. When "taken together," those acts "warranted further investigation" and justified the initial stop of Terry. *Id.* at 22-23.

In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), the Court applied *Terry*'s reasonable-suspicion test, including the totality-of-the-circumstances approach, to an investigative stop of a car near the Mexican border. *Id.* at 878-885. "[W]hen an officer's observations lead him reasonably to suspect that a



particular vehicle may contain aliens who are illegally in the country," the Court held, "he may stop the car briefly and investigate the circumstances that provoke suspicion." *Id.* at 881. The Court listed "illustrative" factors that may be taken into account when deciding whether reasonable suspicion exists to stop a vehicle near the Mexican border. *Id.* at 884-885 & n.10.[9] The Court stressed, however, that "[e]ach case must turn on the totality of the particular circumstances." *Id.* at 885 n.10. "In all situations," moreover, "the officer is entitled to assess the facts in light of his experience in detecting illegal entry and smuggling." *Id.* at 885.

Since *Terry*, this Court has rejected holdings by lower courts that have attempted to limit the range of facts that officers may consider in making investigative stops. In *United States* v. *Cortez*, 449 U.S. 411 (1981), for example, Border Patrol agents predicted from signs of past smuggling activity that a vehicle would pick up a group of illegal aliens at a particular point along a highway in southern Arizona, on a certain night. *Id.* at 413-415. The agents staked out the highway and observed a pickup truck with a camper shell drive toward the predicted pick-up location, and then return after a period of time that correlated with the round-trip distance to the expected pick-up point. The agents stopped the truck and found illegal aliens. *Id.* at 415-

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[9] Those factors are: (1) the characteristics of the area where the vehicle is traveling, such as "[i]ts proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic;" (2) information about recent illegal border crossings; (3) the driver's behavior, such as "erratic driving or obvious attempts to evade officers;" (4) "[a]spects of the vehicle itself," such as its capacity to hold concealed cargo or signs that the vehicle is heavily loaded; and (5) personal characteristics or dress suggesting Mexican nationality. 422 U.S. at 884-885.

416. The Ninth Circuit reversed the ensuing convictions, holding that the reasonable suspicion test required "something * * * in the activities *of the person* being observed or in his surroundings that affirmatively suggests *particular* criminal activity," and that the stop was invalid because the truck's trip down the highway and back was consistent with "innocent inferences." *United States* v. *Cortez*, 595 F.2d 505, 508 (9th Cir. 1979).

This Court reversed. In finding that the stop was supported by reasonable suspicion, the Court explained that "the essence" of the reasonable suspicion test "is that the totality of the circumstances—the whole picture—must be taken into account." 449 U.S. at 417. The Court made clear that the question is not, as the Ninth Circuit had suggested, whether some specific fact "affirmatively suggests particular criminal activity," 595 F.2d at 508 (emphasis omitted), but "whether, based upon the whole picture, [the officers] could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity," 449 U.S. at 421-422.

Six years later, in *United States* v. *Sokolow*, 490 U.S. 1 (1989), the Court again reviewed an attempt by the Ninth Circuit to depart from the totality-of-the-circumstances approach. In *Sokolow*, federal agents stopped an airline passenger on suspicion of being a drug courier, primarily because of six facts: the passenger paid for his tickets with cash; he traveled under a name that did not match the listing for the telephone number he gave; he flew from Hawaii to Miami (a source city for narcotics) and back; he stayed in Miami only 48 hours, despite the long trip; he appeared nervous; and he did not check his luggage. *Id.* at 3-5. The agents found drugs after a drug-sniffing dog alerted on the passenger's bag, and the district court denied a motion to suppress the evidence. *Id.* at 5-6.



The court of appeals reversed. It held that facts bearing on reasonable suspicion are appropriately divided into two categories: "facts describing 'ongoing criminal activity,'" and "facts describing 'personal characteristics' of drug couriers." 490 U.S. at 6 (quoting *United States* v. *Sokolow*, 831 F.2d 1413, 1419, 1420 (9th Cir. 1987)). In the court of appeals' view, personal characteristics are relevant to reasonable suspicion only if (1) they are accompanied by evidence of ongoing criminal activity, and (2) the government shows "that the combination of facts at issue d[oes] not describe the behavior of 'significant numbers of innocent persons.'" *Ibid.* (quoting 831 F.2d at 1420). Applying that test, the court of appeals found no evidence of ongoing criminal activity and held the stop of Sokolow unconstitutional. *Ibid.*

This Court rejected the Ninth Circuit's "effort to refine and elaborate the requirements of 'reasonable suspicion,'" noting that it created "unnecessary difficulty." 490 U.S. at 7-8. Under the correct analysis, it is not possible to attach "ironclad significance" to particular factors as evidence of ongoing criminal activity under all circumstances, but neither can other factors be dismissed as "consistent with innocent travel," without reference to the surrounding facts. *Id.* at 8-9. Applying those principles, the Court held that the federal agents had sufficient grounds to stop the airline passenger. *Id.* at 8-11.

Most recently, in *Illinois* v. *Wardlow*, 528 U.S. 119 (2000), the Court once again considered whether lawful conduct that is "ambiguous and susceptible of an innocent explanation" can nevertheless contribute to reasonable suspicion. *Id.* at 125. *Wardlow* involved a

stop of a suspect who fled at the sight of police entering an area. The Court rejected the holding of the Illinois Supreme Court that running from police must be considered innocent as a matter of law, see *id.* at 122-123, and noted that an officer may give weight to ambiguous conduct when making "commonsense judgments and inferences" about the likelihood that illegal activity is occurring, *id.* at 125 (citing *Cortez*, 449 U.S. at 418). Thus, an individual's presence in a high-crime area—although it would not alone provide reasonable suspicion—may be considered in reasonable-suspicion analysis. *Ibid.* So too, Wardlow's unprovoked flight from the police was cognizable in accordance with the general rule "that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Id.* at 124.

### B. The Court Of Appeals' Categorical Approach To The Reasonable-Suspicion Inquiry Is Inconsistent With This Court's Holdings

Notwithstanding this Court's consistent instruction, the Ninth Circuit held in this case that the reasonable-suspicion inquiry does not allow consideration of all the circumstances known to the investigating officer. In "attempt[ing] * * * to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops," Pet. App. 12a, the court of appeals articulated precisely the sort of inflexible legal rules that are neither useful nor permissible under the rubric of reasonable suspicion. See *Sokolow*, 490 U.S. at 7-8. By ruling that "some of the factors on which the district court relied are neither relevant nor appropriate to a reasonable suspicion analysis in this case" (Pet. App. 12a), moreover, the court of appeals ignored "the essence of all that has



been written." *Cortez*, 449 U.S. at 417. That is, "the totality of the circumstances—the whole picture—must be taken into account." *Ibid.*

1. The court of appeals forthrightly stated its intent to "delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involved here." Pet. App. 12a. Consistent with that intent, the court eliminated seven different facts observed by Agent Stoddard from the reasonable-suspicion calculus "as a matter of law," *id.* at 14a (internal quotation marks omitted), without limiting its exclusions to this one case. See *id.* at 12a-17a. In *United States* v. *Sigmond-Ballesteros*, 247 F.3d 943 (9th Cir. 2001), moreover, the court of appeals cited its decision in this case for the proposition "that only 'certain factors may be considered by law enforcement officers in making stops'" of traffic near the border. *Id.* at 947 (quoting Pet. App. 12a). Such a rule is unequivocally foreclosed by this Court's totality-of-the-circumstances test.

2. The court of appeals suggested that the totality-of-the-circumstances test should be limited because, otherwise, "no one can be sure whether a particular combination of factors will justify a stop until a court has ruled on it."[10] Pet. App. 12a. This Court has

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[10] Although the court of appeals here quoted from Judge Kozinski's concurrence in *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1140, 1142 (9th Cir.) (en banc), cert. denied, 121 S. Ct. 211 (2000), Judge Kozinski did not suggest that certain facts indicating criminal activity should be disregarded. Judge Kozinski's principal point was that a single factor known to a law enforcement officer (such as turning one's car around just short of a Border Patrol checkpoint) may alone provide reasonable suspicion, making it unnecessary to consider other, supporting considerations. *Id.* at 1140-1142. Judge Kozinski additionally

already rejected that reasoning. In *Cortez*, the Court acknowledged that "[t]erms like 'articulable reasons' and 'founded suspicion' * * * fall short of providing clear guidance dispositive of the myriad factual situations that arise," 449 U.S. at 417, but concluded that "common-sense conclusions about human behavior * * * by those versed in the field of law enforcement" nevertheless provide a firm foundation for reasonable-suspicion analysis, *id.* at 418. The Court noted that just as jurors are permitted to make determinations based on all the information before them, without rigid rules for weighing the evidence, "so are law enforcement officers." *Ibid.*; see also *Sokolow*, 490 U.S. at 7-8.

In *Illinois* v. *Gates*, 462 U.S. 213 (1983), the Court reached a similar conclusion in the context of probable-cause determinations. The Illinois Supreme Court had held that an informant's tip could not contribute to probable cause unless the tip (1) revealed the informant's basis of knowledge, and (2) provided facts establishing either the veracity of the information or, alternatively, the reliability of the report. *Id.* at 228-229; see *Spinelli* v. *United States*, 393 U.S. 410, 413-416 (1969). This Court rejected that rule and held that the "totality-of-the-circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." 462 U.S. at 230-231. "One simple rule," the Court concluded, "will not cover every

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suggested that it is not helpful to disaggregate and assign different weights to various categories of factors. *Id.* at 1142 ("[W]e now have different classes of factors—regular and jumbo. How many regular factors add up to make a substantial factor? And how many substantial factors amount to reasonable suspicion? I have no clue, which makes me think that cops on their beats all over this circuit will have some trouble figuring it out as well.").



situation." *Id.* at 231-232 (internal quotation marks omitted). The two-pronged test applied by the state court "encouraged an excessively technical dissection of informants' tips," and focused "undue attention * * * on isolated issues that cannot sensibly be divorced from the other facts presented to the magistrate." *Id.* at 234-235. The Court applied the reasoning of *Gates* to the reasonable-suspicion inquiry in *Sokolow*, 490 U.S. at 7-8.

In *Ornelas* v. *United States*, 517 U.S. 690 (1996), the Court made a similar point in holding that district courts' determinations about the existence of reasonable suspicion (and probable cause) are subject to de novo review. The Court acknowledged in *Ornelas* that the totality-of-the-circumstances rule "is multi-faceted," 517 U.S. at 698, and that "[a]rticulating precisely what 'reasonable suspicion' * * * mean[s] is not possible," *id.* at 695. But the Court observed that contextual application of a "fluid concept[]" better fits the Fourth Amendment's reasonableness standard than any "neat set of legal rules." *Id.* at 695-696 (internal quotation marks omitted). See also *Ker* v. *California*, 374 U.S. 23, 33 (1963) (because "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," "[e]ach case is to be decided on its own facts and circumstances").

This Court's repeated rejection of inflexible rules for reasonable-suspicion analysis reflects the "the myriad factual situations that arise" in law enforcement. *Cortez*, 449 U.S. at 417. That variety makes it extremely difficult to craft rules that are sufficiently general to be useful in a broad range of cases, yet sufficiently specific to be meaningful in practical application. It also would be unreasonable to expect law-enforcement officers to recall and apply, "on the spur

(and in the heat) of the moment" (*Atwater* v. *City of Lago Vista*, 121 S. Ct. 1536, 1553 (2001)), a large and ever-increasing body of judicial precedent regarding what factors may or may not be considered, and what amount of weight must be assigned to each cognizable factor. Cf. *id.* at 1553-1555 (noting practical difficulty of applying a rule that forbids warrantless arrests for a limited category of crimes).

The particular rules adopted by the court of appeals in this case compound the practical problems inherent in any effort to limit the totality-of-the-circumstances approach. The Ninth Circuit would require law-enforcement officers to ignore facts that, based on the officer's training and experience, contribute to reasonable suspicion. Whenever a fact observed by an officer already has been found irrelevant as a matter of law under the Ninth Circuit's approach, the officer must attempt to exclude the fact from his or her assessment of the situation. The officer thus is left to guess about what degree of suspicion would exist in the absence of the forbidden fact. Officers also must attempt to anticipate whether other factors they deem significant under the totality of the circumstances might fail an ill-defined standard of "sufficient" relevance when isolated from the surrounding facts during judicial proceedings that may occur "months and years after [the stop] is made." *Atwater*, 121 S. Ct. at 1553-1554. The result of the court's rule would be to substitute an appellate court's "library analysis" for "common-sense conclusions * * * by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418.

3. The court of appeals further suggested (Pet. App. 12a-17a) that some types of activity should be excluded from the reasonable-suspicion inquiry because: (1) they are almost always innocent; (2) they invite subjective



application by law-enforcement officers; or (3) considering them would put some groups of law-abiding citizens (particularly members of minority groups) at a heightened risk of being stopped by law-enforcement officers. The court of appeals' concerns provide no basis for departing from the totality-of-the-circumstances test.

a. With respect to the court of appeals' view that certain behavior is virtually always innocent, this Court has settled beyond question that behavior can be common among law-abiding citizens, and innocent to untrained eyes, yet nevertheless relevant to reasonable-suspicion analysis. In *Sokolow*, for example, the Court explained that facts that individually are "quite consistent with innocent travel"—such as paying cash for an airline ticket or taking a long flight to Miami and staying only a short time—can "together * * * amount to reasonable suspicion." 490 U.S. at 8-9. Likewise, the *Wardlow* Court rejected the argument that fleeing from the police could not support reasonable suspicion because "there are innocent reasons" why one might run from law-enforcement officers. 528 U.S. at 125. Noting that "[e]ven in *Terry*, the conduct justifying the stop was ambiguous and susceptible of an innocent explanation," the Court reiterated that wholly lawful conduct can create ambiguity about possible illegal activity and thereby warrant an investigative stop. *Id.* at 125-126; see *id.* at 130 n.4 (Stevens, J., concurring in part and dissenting in part) ("sometimes behavior giving rise to reasonable suspicion is entirely innocent"); *Terry*, 392 U.S. at 22-23. See also *Cortez*, 449 U.S. at 419 ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion

of a particular person and for action on that suspicion.").[11]

Thus, it was error for the court of appeals categorically to dismiss deceleration upon seeing a Border Patrol vehicle as "in no way indicative of criminal activity" (Pet. App. 12a). See, *e.g.*, *United States* v. *Villalobos*, 161 F.3d 285, 291 (5th Cir. 1998) ("While we recognize that deceleration is a common and often completely innocent response to the approach of a patrol car, we hold that it may be one factor contributing to the reasonable suspicion justifying a stop.").[12]

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[11] Some "innocent" behavior enjoys specific constitutional protection that may affect its consideration as part of the reasonable-suspicion inquiry. See *Florida* v. *Bostick*, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate [with law-enforcement officers], without more, does not furnish the minimal level of objective justification needed for a detention or seizure."); *Terry*, 392 U.S. at 34 (White, J., concurring) ("[A]nswers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation."); see also *INS* v. *Delgado*, 466 U.S. 210, 216-217 (1984) (if an individual declines to consent to questioning by the police "and the police take additional steps * * * to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure"). No such protected behavior was an ingredient of the officer's reasonable suspicion in this case.

[12] Sudden deceleration may indicate, on the particular facts, that the driver is attempting to avoid the police. See, *e.g.*, *Villalobos*, 161 F.3d at 287, 291 (car "decelerated and fell back a mile or more" after being passed by a Border Patrol vehicle); *United States* v. *Magana*, 797 F.2d 777, 781-782 (9th Cir. 1986) (driver slows from 70 to 45 miles per hour, apparently to avoid passing INS vehicles). Sudden deceleration also may suggest under the circumstances that the driver is unusually distracted by or nervous upon seeing the police, which would contribute to suspicion of illegal activity. See, *e.g.*, *United States* v. *Guerrero-Barajas*, 240 F.3d 428, 433 (5th Cir. 2001) ("[T]he driver slowed and began to swerve within his lane once the [Border Patrol] Agents began to follow him."); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1485 (10th Cir. 1994); *United States* v. *Cardona*, 955 F.2d 976, 981 (5th Cir. 1992) (vehicle slowed and began weaving after Border Patrol agents began following it, indicating that the driver was watching the agents in his rearview mirror).



The court of appeals likewise erred when it ruled (Pet. App. 17a) that the apparent presence of cargo on the floor of respondent's minivan was "too common to be of any relevance." The court of appeals did not dispute that a vehicle's "heavily loaded" appearance can suggest concealment of illegal aliens, *Brignoni-Ponce*, 422 U.S. at 885, but it limited that principle to situations in which "the vehicle [i]s riding low or respond[ing] sluggishly to bumps," Pet. App. 16a-17a. The court's limitation is plainly inappropriate, because other observations—even "common" ones—may raise reasonable questions about the presence of hidden illegal aliens in a vehicle.[13]

For similar reasons, the court of appeals erred by barring consideration of Agent Stoddard's belief that respondent's minivan was not associated with a local ranch. See Pet. App. 14a-15a. *Brignoni-Ponce* estab-

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[13] This Court, for example, has held that the use of bed sheets to cover the windows of a pickup truck's camper shell supported an inference that the truck was carrying hidden cargo. *United States* v. *Sharpe*, 470 U.S. 675, 682 n.3 (1985). Similarly, the Fifth Circuit held that a tarp over the bed of a pickup truck, together with the presence of a spare tire in the back seat (suggesting that extra room was needed in the bed), supported reasonable suspicion of alien smuggling. *United States* v. *Orozco*, 191 F.3d 578, 582 (5th Cir. 1999). In *United States* v. *Magana*, the Ninth Circuit held that a cargo of plywood and clothing that obstructed the view into the back of a pickup truck was a factor that justified a stop to check for illegal aliens. 797 F.2d at 780-781.

lished that "the usual patterns of traffic on the particular road" where a stop is made are potentially relevant to reasonable suspicion. 422 U.S. at 884-885. And the courts of appeals recognize that an unfamiliar vehicle can raise legitimate questions in the mind of an experienced law-enforcement officer.[14]

b. The court of appeals also erred in suggesting (Pet. App. 12a, 13a-14a) that facts relating to an individual's acknowledgment of, or failure to acknowledge, a law-enforcement officer should be excluded from *Terry* analysis because officers otherwise may apply them subjectively. The court reasoned that the range of behavior that may be deemed suspicious is so broad that "reliance upon 'suspicious' looks [or, as the case may be, the failure to look] can . . . easily devolve into a case of damned if you do, equally damned if you don't." *Id.* at 13a (quoting *United States* v. *Montero-Camargo*, 208 F.3d 1122, 1136 (9th Cir.) (en banc), cert. denied, 121 S. Ct. 211 (2000)) (court's alterations).[15]

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[14] See, *e.g.*, *United States* v. *Gonzalez*, 190 F.3d 668, 670, 671-672 (5th Cir. 1999) (agents' failure to recognize vehicle supports reasonable suspicion); *Magana*, 797 F.2d at 780 ("[T]he out-of-state license plate indicated that the truck did not belong to any local farmer."); *United States* v. *Leyba*, 627 F.2d 1059, 1064 (10th Cir.) (license plate from a neighboring State contributes to reasonable suspicion of alien trafficking where Border Patrol agent did not recognize the vehicle as local traffic), cert. denied, 449 U.S. 987 (1980); *United States* v. *Sarduy*, 590 F.2d 1355, 1356, 1358 (5th Cir. 1979) (where agents "knew 'just about everybody that lives out on the ranches,'" their failure to recognize a pickup truck supported reasonable suspicion).

[15] In his dissenting opinion in *Sokolow*, Justice Marshall made a similar argument that criminal "profiles" have a "chameleon-like way of adapting to any particular set of observations." 490 U.S. at 13 (internal quotation marks omitted). Justice Marshall indicated, however, that he did not consider such concerns well-founded when an investigative stop is supported by "case-by-case police work" and "fact-specific inferences," rather than "mechanistic application of a formula of personal and behavioral traits in deciding whom to detain." *Ibid.*



As the Ninth Circuit correctly recognized in *Montero-Camargo*, however, facts such as "eye contact [with an officer], or the lack thereof * * * must be evaluated in light of the circumstances of each case." 208 F.3d at 1136 (internal quotation marks omitted). A driver's quick glance at a law-enforcement vehicle in a rear-view mirror may be insignificant, *ibid.*, whereas it would be relevant that a pedestrian looked at an officer just before he rushed to a car and drove away, *United States* v. *Gordon*, 231 F.3d 750, 755, 756 (11th Cir. 2000). Likewise, looking away from a law-enforcement officer may be "quite natural" when there is other, eye-catching activity to view, *United States* v. *Pulido-Santoyo*, 580 F.2d 352, 354 (9th Cir.), cert. denied, 439 U.S. 915 (1978), but highly relevant when it appears to be an attempt to conceal one's face. See, *e.g.*, *Sigmond-Ballesteros*, 247 F.3d at 949; *United States* v. *Tate*, 648 F.2d 939, 941, 942 (4th Cir. 1981); see also *Brignoni-Ponce*, 422 U.S. at 885 (Border Patrol may take into account an observation that "persons [are] trying to hide."). The significance of looking at or acknowledging an officer therefore must be decided in context.

c. Finally, the court of appeals suggested (Pet. App. 15a) that it is appropriate to exclude factors such as where a person lives because considering such factors in reasonable-suspicion analysis may affect particular socioeconomic groups or minorities disproportionately. The court of appeals did not suggest that Agent Stoddard harbored any impermissible motive when he stopped respondent's minivan, and the officer's subjec-

tive intent would be irrelevant in Fourth Amendment analysis. "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race," but "the constitutional basis for objecting to intentionally discriminatory application of laws is [equal protection], not the Fourth Amendment." *Whren* v. *United States*, 517 U.S. 806, 813 (1996).[16]

In the absence of any impermissible motive for the stop in this case, the court of appeals appeared to conclude (Pet. App. 15a) that the objective fact that an individual resides in an area known for crime must be

[16] As a matter of Fourth Amendment law, the courts of appeals generally hold that race and ethnicity are insufficient in themselves to support an investigative stop, but may contribute in some circumstance to a well-founded suspicion of criminal conduct. See, *e.g.*, *United States* v. *Morrison*, 2001 WL 687624, at *4 (7th Cir. June 20, 2001) ("When police are searching for a bank robber described as a black male, it is reasonable for them to be looking for a black man."); *United States* v. *Lopez-Martinez*, 25 F.3d 1481, 1487 (10th Cir. 1994) (Hispanic appearance relevant to Border Patrol stop); *United States* v. *Garcia*, 23 F.3d 1331, 1335 (8th Cir. 1994) ("nationality or race may be relevant factors in some instances"); but see *Montero-Camargo*, 208 F.3d at 1131-1135 (agreeing that racial or ethnic appearance "may be considered when the suspected perpetrator of a specific offense has been identified as having such an appearance," *id.* at 1134 n.22, but holding that Hispanic appearance generally may not be considered in areas with large Hispanic populations). See also *Brignoni-Ponce*, 422 U.S. at 886-887 ("The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."); *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985) ("Automotive travelers may be stopped at fixed checkpoints near the border without individualized suspicion even if the stop is based largely on ethnicity.") (citing *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976)).



disregarded as matter of law. Yet the facts of this case illustrate that the court of appeals' prohibition on considering the address to which a vehicle is registered (which the court treated as a proxy for the residency of the vehicle's occupants) is unfounded. The 400 block of 4th Street in Douglas was known for having "stash houses" and as a base for smuggling aliens and narcotics away from the border area. J.A. 37-38, 66-67. The van's registration to that block therefore suggested that respondent's northbound trip may have originated in a smuggling area, which supported an inference that the van was using the back roads for smuggling. The registration might have had very different implications if, for example, the van had been parked in a shopping district near the 400 block of 4th Street. That is another illustration of the fundamental point, missed by the court of appeals in this case, that reasonable-suspicion analysis must be undertaken "in light of the particular circumstances." *Terry*, 392 U.S. at 21; see *id.* at 15 ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.").

## II. THE INVESTIGATIVE STOP IN THIS CASE WAS LAWFUL

Because of its methodological errors, the court of appeals reached the wrong result in this case. The court of appeals never purported to consider "the whole picture" seen by Agent Stoddard. *Cortez*, 449 U.S. at 417. Instead, the court disaggregated the factors that Agent Stoddard deemed *collectively* significant, and dismissed them one by one. The court of appeals thus transformed the reasonable-suspicion inquiry into a series of hurdles, each of which the prosecution had to

overcome by showing the significance of an isolated fact.

Had the court of appeals applied the reasonable-suspicion test correctly, it would not have asked whether each factor *individually* suggested illegal activity. It would have asked whether the totality of the circumstances known to Agent Stoddard and recognized by the district court justified a brief stop of respondent's vehicle to investigate the possibility of a crime. The answer to that question is "Yes."

As the district court explained (Pet. App. 22a-25a), Agent Stoddard knew at the time he stopped respondent that respondent was taking a lightly traveled route that smugglers used to evade a fixed border patrol checkpoint. The route chosen by respondent required a 40-mile trip over mostly dirt roads, when taking the highway would have been quicker and easier. Respondent was traveling at a time of day when smuggling activity in the area increased because of the Border Patrol's shift change.[17] He was driving a type of vehicle that was capable of holding concealed illegal aliens or bulky drugs and had been used by smugglers in the recent past. Agent Stoddard did not recognize the vehicle as being associated with any of the ranches

[17] The court of appeals held that the time at which respondent triggered the Border Patrol's sensors had "little probative value" because the first sensor was triggered approximately 45 minutes before the scheduled 3 p.m. shift change. Pet. App. 18a. The court of appeals' reasoning ignored the time it takes agents to drive back to the checkpoint for the shift change. Consistent with Agent Stoddard's testimony (J.A. 47), the district court found that the sensor was triggered at approximately the same time that "agents are returning to the checkpoint[,] leaving this area open" to smugglers. Pet. App. 23a.



in the area.[18] Respondent's hesitation at the corner of Rucker Canyon Road and Kuykendall Cutoff Road further suggested that he was not familiar with the area (or, alternatively, that respondent was unusually distracted by the Border Patrol vehicle behind him). See Pet. App. 22a-24a; J.A. 36.

Agent Stoddard also knew that the minivan was registered to a particular block in Douglas that was very close to the Mexican border and was commonly used as a staging area for smuggling illegal aliens and narcotics further north. Pet. App. 25a; J.A. 37-38, 66-67. That information, together with the minivan's northbound route from Douglas, supported an inference that the vehicle had started its unusual trip at "an often-used smuggling area" (Pet. App. 25a). See p. 31, *supra*.[19]

[18] When disregarding Agent Stoddard's failure to recognize the minivan, the court of appeals assumed (Pet. App. 14a-15a, 17a-18a) that campers, hikers, bikers, picnickers, and tourists commonly take the same route as respondent. Yet the district court found (*id.* at 22a) that respondent was neither heading toward any nearby recreation area when he was stopped, nor taking a customary route to recreation areas located farther north. Those factual findings were binding on the court of appeals unless clearly erroneous, *Ornelas*, 517 U.S. at 699, and respondent did not challenge them in his appellate brief.

[19] The court of appeals stated that "Agent Stoddard did not explain the factual basis for" his belief that smuggling activity occurred in the area to which the minivan was registered. Pet. App. 16a. In fact, Agent Stoddard testified at the suppression hearing that he was aware that officers apprehended "several groups [of illegal aliens] * * * daily in that area attempting to get into stash houses and such." J.A. 67.

Respondent had slowed down sharply upon seeing Agent Stoddard's Border Patrol vehicle.[20] Respondent and his adult passenger both appeared nervous when they passed Agent Stoddard's truck, and the children engaged in four or five minutes of odd waving that seemed to be directed by the adults. Pet. App. 23a-25a; J.A. 35, 61.[21]

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[20] The posted speed limit on Rucker Canyon Road, at the intersection of Leslie Canyon Road, is 35 miles per hour. J.A. 83, 171. Later on respondent's route, the speed limit drops to 25 miles per hour. J.A. 179. Respondent, however, made no argument below that he slowed in order to avoid exceeding the speed limit when he passed Agent Stoddard's vehicle. Cf. *United States* v. *Diaz*, 977 F.2d 163, 165 (5th Cir. 1992) ("[T]here is nothing suspicious about a *speeding* car slowing down after a marked patrol unit turns to follow.") (emphasis added). To the contrary, respondent's counsel consistently asserted that respondent never violated any traffic laws. J.A. 134; see also Resp. C.A. Br. 30 (arguing that respondent was engaged in "non-dangerous driving, which violate[d] no traffic laws" and noting that Agent Stoddard did not stop respondent for a traffic violation).

[21] The court of appeals mischaracterized the record when it suggested (Pet. App. 13a-14a) that Agent Stoddard relied on the mere facts that respondent failed to acknowledge him when driving past, and that the children waved. Agent Stoddard concluded from respondent's posture and behavior that he was nervous. *Id.* at 24a; J.A. 33, 59-60. That was indisputably relevant. See *Wardlow*, 528 U.S. at 124; *Sokolow*, 490 U.S. at 4, 6, 8, 9 n.4; see also Pet. 18 n.7 (citing court of appeals decisions). Likewise, the children's waving was relevant because (as the district court found after seeing Agent Stoddard imitate the children, see J.A. 35) it was done in a "methodical," "mechanical," and "abnormal way * * * without even turning around to look at the agent." Pet. App. 25a. The unusual manner of the waving led Agent Stoddard to suspect that the adults in the van were coaching the children. And the apparent coaching—not simply the waving—contributed to Agent Stoddard's suspicion. J.A. 35, 61, 73. See generally *Ornelas*, 517 U.S. at 699 (reviewing court should "give due weight to inferences drawn from th[e] facts by resident judges and local law enforcement officers.").



There appeared to be cargo on the floor of the van, where it could not be seen. Pet. App. 24a-25a. Yet respondent, whom Agent Stoddard did not recognize as a local driver, had already passed the turn-offs for local campsites and recreation areas, *id.* at 22a, and a driver making a long-distance trip for which luggage would be needed would be expected to use the highway to avoid a "40-mile trip at least, through a dirt road," *ibid.* As the district court aptly explained, the cargo on the floor of the minivan "[c]ould have been camping equipment, I suppose, had not all the other facts been there pointing to the possibility of illegal activity." *Id.* at 25a.

Agent Stoddard appropriately "piec[ed] together the information at [his] disposal," *Cortez*, 449 U.S. at 419, including the absence of any facts negating his inferences about possible illegal activity. He correctly concluded, based on specific, articulable facts and reasonable deductions that reflected his training and experience, "that criminal activity 'may be afoot.'" *Sokolow*, 490 U.S. at 7 (quoting *Terry*, 392 U.S. at 30); see *Cortez*, 449 U.S. at 418. As the district court determined (Pet. App. 21a-25a), Agent Stoddard's decision to investigate further by stopping and questioning respondent was consistent with the Fourth Amendment.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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